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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,757	07/15/2003	Patrick J. Sweeney	029815-0101	7389

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EXAMINER	
PHILOGENE, PEDRO	
ART UNIT	PAPER NUMBER
3733	

MAIL DATE	DELIVERY MODE
02/12/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/619,757	SWEENEY, PATRICK J.	
	Examiner	Art Unit	
	Pedro Philogene	3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *19 November 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,8-16 and 27-41* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,8-16,27-41* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-3, 13-14, 27, 29, 30, 38 are rejected under 35 U.S.C. 102(e) as being anticipated by Fehling et al. (6,770,094).

With respect to claims 1, 27, 30, 38, Fehling et al disclose a stabilizing element (16,18,20,22) a scaffold assembly comprising a first base (10) and a second base (12) at least one appendage (24) removably attached to the first or the second base, such that the bases and the appendage forming a cage between the first and the second vertebrae, wherein the stabilizing element (16,18,20,22) is retained in the cage without being rigidly attached to the scaffold assembly, and wherein the stabilizing element may be removed from the cage through an opening created by removing at least one of the appendages(24) (if one so desired, as claimed by applicant) a first plate (10) and a second plate (12); as set forth in column 2, lines 55-67, column 3, lines 1-48; and as best seen in FIGS.1-4. The stabilizing element is a disc prosthesis; the stabilizing element is also a fusion element, the plates are rigidly attached to the vertebrae and the spring is being used a s shock absorber, the scaffold is made of titanium. A stabilizing

means (16, 18, 20, 22), a retainer means (24) that is removably attached, wherein the first and second bases plates are ring-shaped.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fehling et al (6,770,094) in view of Baumgartner (5,370,697).

With respect to claim 8, it is noted that Fehling et al did not teach of a first plate and a second plate parallel to the first plate such that the stabilizing element is retained between the first and second plates, as claim by applicant. However, in similar art, Baumgartner evidences the use of an intervertebral disc member to produce a good load distribution and transfer.

Therefore, given the teaching of Baumgartner, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Fehling et al as taught by Baugartner by providing a first plate and second plate parallel to the first plate, such that the stabilizing element is retained therebetween to produce a good load distribution and transfer.

Claims 9,10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fehling et al (6,770,094) in view of Baumgartner (5,370,697) in view of Parsons et al. (5,545,229).

With respect to claims 9, 10, it is noted that the above combination of references did not teach of the first plate and the second plate having high and low friction outer surfaces; as claimed by applicant. However, in similar art, Parsons et al evidences the use of an intervertebral disc spacer with high and low friction mechanism incorporated in the outer surface for attachment to adjacent bony vertebral bodies.

Therefore, given the teaching of Parsons et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Fehling et al, as taught by Parsons et al to provide disc spacer with high and low friction mechanism incorporated in the outer surface for attachment to adjacent bony vertebral bodies.

Claims 15,16,27,28,31,32,33,39-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fehling et al (6,770,094) in view of Richelsoph (7,105,024).

With respect to the above claims it is noted that Fehling et al did not teach of at least two appendages removably coupled to the scaffold assembly; as claimed by applicant. However, in similar art, Richelsoph evidences the use of an intervertebral disc with at least two appendages (31) to prevent the disc from coming out and to allow the surgeon to test different size disc members under load conditions to perfectly fit the disc members in place.

Therefore, given the teaching of Richelsoph, it would have been obvious to one having ordinary skill in the art at the tie the invention was made to modify the device of Fehling as taught by Richelsoph, by incorporating at least two movable appendages to

prevent the disc from coming out and to allow the surgeon to test different size disc members under load conditions to perfectly fit the disc members in place in situ.

Claims 34-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fehling et al (6,770,094) in view of Richelsoph (7,105,024) in view of Baumgatrner (5,370,697).

It is noted that the above combination of references did not teach of buttresses attached to the first and second bases; as claimed by applicant. However, in similar art, Baumgartner evidences the use of an intervertebral disc having buttresses (16, 17) to form a limit or restriction to the relative movement of the plates.

Therefore, given the teaching of Baumgartner, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Fehling et al, as taught by Baumgartner, by incorporating buttresses to form a limit or restriction to the relative movement of the plates.

Response to Amendment

Applicant's arguments, see Remarks, filed 11/19/07, with respect to the rejection(s) of claim(s) 1-3, 8-16, 27-41 under 102 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Richelsoph/Baumgartner/Parsons.

Conclusion

A shortened statutory period for reply to this action is set to expire THREE MONTHS from the mailing date of this action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pedro Philogene/
Primary Examiner, Art Unit 3733
February 7, 2008